Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 16, 2000

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QUESTION PRESENTED FOR REVIEW

The question presented by this Petition is:

Whether respondents' public school district policy permitting student-led prayer at high school graduation exercises, pursuant to results of student referenda, violates the religion clauses of the First Amendment.

LIST OF PARTIES TO THE PROCEEDING[1]

The petitioners, past and current students of respondents' public school system, and parents of minor students, are:

Emily Adler
Bonnie Bear
Aaron Finck
Benjamin Finck
Rachel Finck
Seth Finck
Tyler Hurley
Monica Juodvalkis
Lucy Nord
Roberta Nord
Jonathan Rand
Joshua Weihnacht

Petitioners' request for class certification was not ruled upon below.

Respondents are the Duval County School Board and Duval County Public School District, which operate the public school system in Jacksonville, Duval County, Florida.

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[1] A group of individuals sought to intervene in support of the respondents. Their motion to intervene was denied as moot by the district court and their intervention status was not addressed by the Court of Appeals. These persons are as follows: Rebecca Boles, Ronald Boles, Susan Boles, Ashton Carkhuff, Karlene Carkhuff, Kenneth Carkuff, Sarah Carter, Stan Carter, Susan Carter, Eric S. Hurst, Phillip R. Hurst, Mark Muhlbauer, Charlotte R. Pigg, Douglas D. Pigg, Jonathan D. Pigg, Jody Sciullo, Mark Sciullo, Moriah Sciullo, Nicholas Sciullo, H. Nelson Sturgill, and Kathy C. Sturgill.

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No. _____

IN THE
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the *en banc* opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on March 15, 2000.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals appears at App. 1a-77a of this Petition and is published at 206 F.3d 1070. The panel opinion of the Court of Appeals appears at App. 78a-164a and is published at 174 F.3d 1236. The unpublished order of the district court appears at App. 165a-

167a. A previous opinion of the district court relating to the same policy of respondent, adopted by the district court in this case, appears at App. 168a-190a of this Petition and is published at 851 F.Supp. 446.

JURISDICTION

A panel of the Court of Appeals entered judgment on May 11, 1999. The Eleventh Circuit, *sua sponte*, vacated that judgment in ordering the appeal reheard *en banc* on June 3, 1999. The *en banc* judgment of the court below was entered on March 15, 2000. A timely petition for rehearing of the *en banc* opinion was denied on April 17, 2000. Copies of the order vacating the panel opinion and ordering the case reheard *en banc*, published at 174 F.3d at 1271, and the unpublished order denying rehearing of the *en banc* opinion, appear at App. 191a-193a and 194a-195a, respectively, to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RESPONDENTS' POLICY INVOLVED

This case requires interpretation and application of the First Amendment to the Constitution of the United States. The First Amendment provides, in pertinent part:

> Congress[1] shall make no law respecting an establishment of religion or prohibiting the free exercise thereof....

Respondents' policy is set forth in full at Appendix 196a-197a.

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[1] The First Amendment also applies to the states. *See Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 8 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

STATEMENT OF THE CASE

A. Jurisdiction Below

The petitioners challenge a policy of a Florida public school system relating to "Graduation Prayers" as infringing their rights under the Establishment and Free Exercise Clauses of the First Amendment. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§1331 and 1343(a)(3), and 42 U.S.C. §1983.

B. Proceedings Below

The petitioners seek declaratory, injunctive and monetary remedies. The district court consolidated a hearing on petitioners' motion for preliminary injunction with trial on the merits, denied preliminary injunctive relief and entered judgment for the respondents on the basis of its previous summary judgment in *Adler v. Duval County Sch. Bd.*, 851 F.Supp. 446 (M.D. Fla. 1994) *("Adler I"), aff'd in part, vacated in part,* 112 F.3d 1475 (11th Cir. 1997) *("Adler II").*[2] The district court took judicial notice of the *Adler I* record, which it consolidated with the instant case. *See* App. 166a n.2.

A divided panel of the Court of Appeals rendered its opinion reversing the district court and remanding for further proceedings, finding the challenged policy facially unconstitutional, but the court below vacated the panel opinion and ordered the appeal reheard *en banc. See* App. 80a, 114a-115a, 192-193a; *Adler v. Duval County Sch, Bd.*, 174 F.3d 1236, 1271 (11th Cir. 1999) *("Adler III").* On rehearing *en banc,* the majority of the Court of Appeals found the policy

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[2]In *Adler II,* the Court of Appeals, after two arguments before different panels, did not address the constitutional merits but rather found equitable claims moot and damages claims waived.

that student referenda, involved in the decision of whether prayers are given at graduation exercises, fail to constitute state action and constitute viewpoint neutral selection criteria *See* App. 13a -28a; *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1076-84 1089-91 (11th Cir. 2000) (en banc) (*"Adler IV"*). Two members of the Court of Appeals strongly dissented, and also disputed the majority's conclusion that petitioners had waived their challenge to the policy as applied. *See* App. 44a -77a; 206 F.3d at 1091-1106 (Kravitch, J., dissenting).

C. The Material Facts.

The case arose historically as follows. Invocations, benedictions and other prayers or religious messages traditionally were offered at Duval County public high school graduation ceremonies. *See* App. 182a n.9; *Adler I*, 851 F.Supp. at 453 n. 9. However, following the Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), the respondent's legal affairs officer promulgated a July 22, 1992 policy that "there should be no prayer, benediction, or invocation at any graduation ceremonies" pursuant to *Lee*. App. 4a n.1; *Adler IV*, 206 F.3d at 1071 n.1. During the ensuing academic year, following pressure from various interest groups and individuals seeking to ensure continuation of prayer at graduations, the respondents' superintendent, as he later testified, determined "that it would be appropriate for students themselves at commencement to perform in the way of developing, administering, delivering the prayer at commencement."

Respondents' legal affairs officer then promulgated a May 5, 1993 policy entitled "Graduation Prayers," the policy at issue in this case, which delegates to the "senior class as a whole" whether "a brief opening and/or closing message, not to exceed two minutes" would be given at graduations and, if so, which student would be chosen to deliver the "message." App. 196a. The policy was premised on its face on a contention that its procedures were lawful, despite *Lee*, in

view of the Fifth Circuit's opinion in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992). App. 196a. On June 1, 1993, the respondent Duval County School Board rejected a proposed alternative policy that would have substituted a moment of silence for the "Graduation Prayers" policy. App. 5a; *Adler IV*, 206 F.3d at 1072.

Pursuant to the policy, each high school's senior class or senior class officers vote in elections administered by the school administration and faculty to select a student to deliver the message. Votes often have been taken on the specific issue of whether to include prayer at graduation, and most frequently the speaker selected has been a previously elected class "chaplain." In programs printed by respondents, graduates and audience members are directed to stand during explicitly labeled invocations and benedictions, as well as other less explicitly labeled messages, which, since enactment of the policy, have most often constituted prayers. The audience is directed to stand for "messages" delivered pursuant to the "Graduation Prayers" policy, but not for most other portions of the program. *See* App. 57a & n.7, 67a & nn. 15-17, 75a-76a & nn. 29-31; *Adler IV*, 206 F.3d at 1097 & n.7, 1102 & nn. 15-17, 1105-06 & nn. 29-31 (Kravitch, J., dissenting). As in *Lee*, respondents exercise a high degree of control over all aspects of graduation ceremonies. App. 49a-51a, 54a-57a; *Adler IV*, 206 F.3d at 1093-1094, 1096-97 (Kravtich, J., dissenting)

D. The Holdings Below

The district court concluded that respondents' policy does not violate the First Amendment, in critical part because of the student election mechanism and because of its conclusion that graduation ceremonies are limited public fora. App. 181a-185a. *Adler I*, 851 F.Supp. at 453-55. The district court also distinguished the case from this Court's decision in *Lee* on the basis of the rationale of *Jones v. Clear Creek Indep.*

Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied* 508 U.S. 967 (1993). App. 186a-188a; *Adler I*, 851 F.Supp. at 455-56. As noted above, the district court in the present case adopted its 1994 order on cross motions for summary judgment in *Adler I*. App. 167a. *See* App. 169a, 190a; *Adler I*, 851 F.Supp. at 448, 456.

The *en banc* Court of Appeals, after vacating a panel decision that reversed the district court, found that the "Graduation Prayers" policy "insulates" resulting prayers from state action because of the student vote mechanism. App. 11a-28a; *Adler IV*, 206 F.3d at 1075-84. The *en banc* majority also analogized the circumstances to those warranting a public forum analysis, App. 15a-18a & n.6; 206 F.3d at 1077-78 & n.6, and found the voting mechanism constitutionally neutral, App. 24a-26aa, 206 F.3d at 1082-83. The majority below further concluded that the policy passes scrutiny under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. 28a-42a; *Adler IV*, 206 F.3d at 1084-1090.

The dissent below concluded that the student vote, and its results, are attributable to the state, that the strictures of the policy promote invocation and benediction prayer in a highly controlled school environment, that majority voting on the issue is not constitutionally neutral and that the preeminent purpose and primary effect of the policy are to advance and endorse religion. App. 44a-77a; 206 F.3d at 1091-1106 (Kravitch, J., dissenting). Indeed, almost all of the printed graduation programs prepared by respondents for ceremonies from 1994 through 1998 utilize the terms "invocation" and "benediction" to identify the "messages," and most identify the student speaker selected by majority vote as the senior class "chaplain." App. 67a n.17, 75a-76a n.31; 206 F.3d at 1102 n.17, 1106 n.31 (Kravitch, J., dissenting). The dissent rejected the majority's public forum analogy based on the facts and on Third, Fifth and Ninth Circuit holdings that "graduation ceremonies have never been considered

public fora." App. 70a; 206 F.3d at 1103-04 (Kravitch, J., dissenting) (citations omitted). The dissent concluded:

> [T]he policy encourages the delivery of a prayer during a stage of the graduation ceremony when the content seems most "official" and when officials' control over audience participation is at its highest....
>
> Moreover, the policy utilizes the vote to further its purpose, and in so doing corrupts the most cherished of democracy's tools. For the government cannot delegate the authority to do what it could not do itself, and constitutional rights are not subject to the whims of an electoral majority.

App. 76a-77a; 206 F.3d at 1106 (Kravitch, J., dissenting).

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions of significance throughout the United States regarding prayer at public high school graduation exercises. The Courts of Appeals have reached conflicting conclusions on the issue in the wake of the *Lee v. Weisman* decision, and the *en banc* majority opinion below conflicts with precedents of this Court, even a decision during the current term. Furthermore, the disposition of this petition may be controlled, or at least substantially guided, by the Court's forthcoming decision in *Santa Fe Indep. Sch. Dist. v. Doe*, No. 99-62.

In limiting its grant of certiorari in *Santa Fe* to the issue of prayers at public high school football games pursuant to student referenda, the Court reserved the issue of prayers at graduation exercises pursuant to such referenda. The Eleventh Circuit's *en banc* decision in this case conflicts with and specifically rejects the Fifth Circuit's decision in *Santa Fe*

on the issue of prayer at graduation. *See* App. 19a-20a n.7; *Adler IV*, 206 F.3d at 1079 n.7. The opinion below also conflicts with the Third Circuit's decision in *ACLU of New Jersey v. Black Horse Pike Reg'l. Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996) *(en banc)*, invalidating a policy allowing prayer at graduations pursuant to student vote.[3]

Since 1993, respondents have conducted student referenda to elect speakers to deliver "messages," not to exceed two minutes, near the beginning and end of public high school graduation exercises. The duration and placement of this opportunity for a single elected student to speak is consistent solely with the tradition of invocations and benedictions at Duval County graduations,, which the district court described as "familiar if not expected." App. 182a n.9; *Adler I*, 851 F.Supp. at 453 n.9. The record is replete with evidence of explicitly labeled invocations and benedictions, most often delivered by class "chaplains" elected pursuant to the policy. Like policies of a number of public school districts around the nation, respondents' policy seeks to evade *Lee* by unconstitutionally delegating to student majorities decisions that respondents could not constitutionally make themselves. The majority below, however, erroneously concluded that prayer resulting from the policy was not attributable to the state because the student vote constitutes a viewpoint-neutral means of providing a single student the opportunity to speak at a state-controlled school event.

Contrary to the opinion of the *en banc* majority below, the Court recently condemned a student referendum

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[3] The Ninth Circuit has reached two at least arguably disharmonious decisions on the issue, although both were subsequently vacated for mootness. *See Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated*, 515 U.S. 1154 (1995); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated and dismissed*, 177 F.3d 789 (9th Cir. 1999). The decision below conflicts with *Harris*.

mechanism relating to speech and other expressive activities as inconsistent with the constitutional requirement of government viewpoint neutrality. The Court in *Board of Regents v. Southworth* gave no pause to any notion that the speech involved was divorced from state action because the state must be viewpoint neutral in assisting otherwise private speech, and majority determinations of speech issues simply are not viewpoint neutral because minority views are thereby not accorded the same treatment or respect as those of the majority. *Southworth*, ___ U.S. ___, ___, 120 S.Ct. 1346, 1350, 1354, 1357 (2000). Like *Southworth*, this case involves delegating a state-assisted, exclusive opportunity to speak to the outcome of student referenda created by government policy.

The majority of the *en banc* Court of Appeals reached a conclusion conflicting directly with *Southworth* and other decisions of this Court in holding that the student referenda involved are both divorced from state action and are viewpoint neutral. Issues of fundamental constitutional rights may not be determined by majority vote. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The First Amendment precludes a majority from using "the machinery of the state to practice its religious beliefs." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). Any state delegation of power to a religious majority must foreclose religious favoritism and require neutrality. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706, 709-10 (1994). The dissent below is fully consistent with the precedents of this Court in concluding that the referenda pursuant to the Duval County policy fail to separate the resulting religious speech from state action and fail to constitute neutral selection criteria.

The decision of the Eleventh Circuit also conflicts with this Court's principal holdings in *Lee v. Weisman*, 505 U.S. 577 (1992). The Court in *Lee* reiterated the constitutional

prohibition of majority rule in matters implicating the Establishment Clause. *Lee*, 505 U.S. at 596. A *Lee* analysis demonstrates that respondents' policy also results in state coercion of student participation in religious exercises resulting from majoritarian decisionmaking in light of the essentially required nature of attendance at a graduation highly controlled by the state. *See Id.* at 592-94.

The Court of Appeals' majority reads state control of graduations, found in *Lee*, out of any existence in this case and also fails to address the prohibition on state coercion of participation in religious exercises. *See Lee*, 505 U.S. at 599; App. 55a; *Adler IV*, 206 F.3d at 1096-97 (Kravitch, J., dissenting). The majority below also fails to apply *Lemon* properly by ignoring the material facts. The dissent was based on consideration of the record.

"The dominant reason for its [the policy's] passage was to keep prayer in graduation ceremonies," and the policy on its face betrays its preeminent purpose to advance religion, with secular justifications nothing more than insincere rationalization or mere incidental effects. App. 98a; *Adler IV*, 206 F.3d at 1098 (Kravitch, J., dissenting). Additionally, the Court of Appeals overlooks the policy's "preference for religious expression despite the seeming neutrality of its terms," rendering its primary effect one of advancing or endorsing religion. App. 66a; 206 F.3d at 1101 (Kravitch, J., dissenting), *citing, inter alia, County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Moreover, the majority below erred in even drawing an analogy to the public forum doctrine because graduation ceremonies have never been considered public fora, and a public forum is not created by allowing a student majority to elect a single speaker. App. 69a-72a; *Adler IV*, 206 F.3d at 1103-04 (Kravitch, J., dissenting); *ACLU of New Jersey v. Black Horse Pike Reg'l. Bd. of Educ.*, 84 F.3d 1471, 1478 (3rd Cir. 1996) *(en banc); Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 838 (1998), *vacated as moot*, 177 F.3d

789 (9th Cir. 1999) *(en banc); Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 418 (5th Cir. 1991), *vacated on other grounds*, 505 U.S. 1215 (1992).

The Court's forthcoming decision in *Sante Fe Indep. Sch. Dist. v. Doe*, addressing prayers at football games pursuant to student referenda, may control the disposition of this Petition because of the cases' public school contexts, non-neutral majoritarian decisionmaking or other common aspects. The most critical difference between the cases is the coercive effect of essentially compelled attendance at graduation exercises involved here, *see Lee*, 505 U.S. at 595, as opposed to the more voluntary nature of attendance at sports events involved in *Santa Fe*. Because of the potential differences in a coercion or endorsement analysis between the football game scenario presented in *Santa Fe* and the graduation ceremony circumstances involved in this case, this petition presents issues that warrant separate consideration by this Court even after the decision in *Santa Fe*. Accordingly, the Court should grant review.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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